

Chapter 7

Consultation, Review, and Permit Requirements

CHAPTER 7 – CONSULTATION, REVIEW, AND PERMIT REQUIREMENTS

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- **This section addresses Federal statutes, regulations, and Executive Orders** that potentially apply to the proposed Policy Directions. In each case, the text provides a brief description of the applicable law or order and the compliance with the respective requirements. The conclusions stated here are based upon the analysis within the EIS and the appendices.
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7.1 NATIONAL ENVIRONMENTAL POLICY ACT

This EIS was prepared pursuant to regulations implementing the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.), which requires Federal agencies to prepare environmental impact statements for major Federal actions that may significantly affect the quality of the human environment. Pursuant to CEQ regulations for the implementation of NEPA, major Federal actions include the adoption of formal plans or official policies that guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based. Information about the potential environmental consequences of the actions must be made available to decisionmakers and to the public before decisions are made and before actions are taken. Decisions will be based on understanding of the environmental consequences and actions will be taken to protect, restore, and enhance the environment. Additionally, this EIS is a broadly scoped policy-level analysis. By design, BPA intends to tier those site-specific actions that are consistent with the selected Policy Direction to this EIS.

7.2 ENDANGERED AND THREATENED SPECIES AND CRITICAL HABITAT

The Endangered Species Act (ESA) of 1973 (16 U.S.C. 1536), as amended, requires Federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the destruction or adverse modification of their critical habitats. BPA, the Corps, and the Bureau have consulted with NMFS and USFWS regarding a fish and wildlife mitigation and recovery strategy and the effects of potential future actions related to the FCRPS configuration, operations, and maintenance upon listed threatened and endangered species. Consequently, NMFS and USFWS have issued Biological Opinions (BiOps).¹ BPA's decision to fund or implement fish and wildlife mitigation and recovery activities will reflect these ESA consultations. Therefore, no separate or distinct consultation is planned or necessary with respect to the alternative

¹ See Chapter 1, Section 1.3.2, for more on these Biological Opinions.

Policy Directions. A complete listing of species in the Region listed as endangered or threatened is included in Appendix C.

If site-specific implementing actions were to affect listed species in a manner or to an extent inconsistent with the BiOps, additional consultations might become necessary. Accordingly, the appropriate offices of the USFWS and NMFS would be contacted for lists of species. As necessary, Biological Assessment(s) analyzing the effects of the actions on any listed species would be prepared. These Biological Assessments would be forwarded to the USFWS and/or NMFS for their consideration, and the outcome of such consultations would be reflected in any subsequent NEPA process.

7.3 FISH AND WILDLIFE CONSERVATION

The Fish and Wildlife Conservation Act of 1980 (16 U.S.C. 2901 et seq.) encourages Federal agencies to conserve and to promote conservation of non-game fish and wildlife species and their habitats. BPA is fully considering fish and wildlife needs in developing the alternative Policy Directions, assessing their impacts, and identifying potential mitigation measures. The Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) requires Federal agencies undertaking projects affecting water resources to consult with the USFWS when any body of water is impounded, diverted, controlled, or modified for any purpose. Most Policy Directions promote actions consistent with the 2001 USFWS BiOp on FCRPS operations. To the extent that BPA needed to re-consult with the USFWS, with respect to a Policy Direction or future site-specific implementing actions, the Agency would do so.

The National Wildlife Refuge System Administration Act consolidates various categories of wildlife ranges and refuges for management under a single program. The Act provides protection for both wildlife and refuge lands from destruction and injury. Several major National Wildlife Refuge areas are located within the scope of this analysis, including: (1) the Umatilla National Wildlife Refuge, (2) the McNary National Wildlife Refuge, (3) the Julia Butler Hansen National Wildlife Refuge, and (4) the Tualatin National Wildlife Refuge. Generally, any actions implementing the Policy Directions would only minimally affect these refuges. However, impacts are possible. Therefore, depending upon the potential impacts associated with the final decision, BPA will consider mitigation for the impacts on refuge lands.

The Migratory Bird Treaty Act requires that lands, waters, or interests acquired or reserved for purposes established under the Act be administered under regulations promulgated by the Secretary of Interior. These regulations conserve and protect migratory birds in accordance with certain international treaties; protect other wildlife, including threatened and endangered species; and restore or develop adequate wildlife habitat. BPA will comply with such regulations in implementing any actions consistent with the alternative Policy Direction.

The Pacific Northwest Electric Power Planning and Conservation Act (Regional Act) (16 U.S.C. 839 et seq.) contains provisions intended to protect, mitigate, and enhance the fish and wildlife (including their spawning grounds and habitat) of the Columbia River and its tributaries. The Pacific Northwest Electric Power and Conservation Planning Council (Council), established under the Regional Act, was entrusted with adopting a Fish and Wildlife Program for the Columbia River Basin and developing a Regional Electric Power and Conservation Plan (Plan). In implementing its mandate to assure an adequate, efficient, economical, and reliable power supply, BPA must give due consideration to the protection, mitigation, and enhancement of the Region's fish and wildlife resources. Any actions BPA takes (including implementing actions as well as acquisition of major resources, i.e., resources with a planned capability greater than 50 average megawatts acquired for more than 5 years) must be consistent with the Plan, except as otherwise provided for in the Regional Act or unless an exemption is granted by Act of Congress. BPA is coordinating with the Council to integrate any strategic system policy alternatives with the Council's Program and Amendments.

7.4 HERITAGE CONSERVATION

A number of Federal laws and regulations have been promulgated to protect the Nation's historical, cultural, and prehistoric resources. BPA must consider whether its actions might have an effect on a property listed or eligible for listing on the National Register of Historic Places, a property listed on the National Registry of Natural Landmarks, a property listed as a National Historic Landmark, a property listed on the World Heritage List, a property listed on a state-wide or local list, or the ceremonial rites or access to religious sites of Native Americans. This EIS is a policy-level analysis; however, consistent with Section 106 of the National Historic Preservation Act (16 U.S.C. 470), BPA will consult with the appropriate State Historic Preservation officers, and corresponding Tribal Historic Preservation officers, before undertaking any site-specific actions.

In addition, for over 10 years BPA has had a Programmatic Agreement with the Bureau; the Corps; USFS; the Advisory Council on Historic Preservation; the Idaho, Montana, and Washington State Historic Preservation Officers (SHPOs); the Colville Confederated Tribes; and the Spokane Tribe of Indians. This Programmatic Agreement addresses impacts on cultural resources from changes in elevation at the five major Federal storage reservoirs on the Columbia River system, satisfying BPA's responsibilities under Section 106 of the National Historic Preservation Act. The Programmatic Agreement also supports BPA's compliance with the American Indian Religious Freedom Act and the Native American Graves Protection and Repatriation Act by providing for BPA participation in the disposition of Native American burials if such sites are discovered.

7.5 ENVIRONMENTAL JUSTICE

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Although this order does not create any enforceable rights, benefits, or trust responsibilities, it does direct Federal agencies to implement the order consistent with, and to the extent permitted by, existing law. Pursuant to this order, agencies should provide opportunities for community input in the NEPA process. Moreover, agencies should "identify potential effects and mitigation measures in consultation with affected communities."

The Order specifically applies to actions affecting Native Americans. Additionally, in 1996, BPA adopted a Tribal Policy.² The fundamental principles in the policy include the recognition of the unique character of each tribe, as a sovereign, and a commitment to government-to-government consultations to ensure consideration of tribal concerns before BPA takes actions that may affect tribal resources. Accordingly, BPA has worked to reflect tribal ideas, issues, and concerns into this EIS. Members of the EIS team presented displays and literature discussing the EIS and invited comments on our proposed action at the 17 Region-wide meetings during the spring of 2000 on the Draft NMFS FCRPS BiOp and the Conservation of Columbia Basin Fish: Building a Conceptual Recovery Plan (Conceptual Plan).³ Separate EIS-only scoping meetings were also held during this period in Portland, Oregon, after notice in the *Federal Register*. In addition, following publication of the Draft EIS in June 2001, several public comment meetings were held throughout the BPA service area during the Draft EIS public comment period in the summer of 2001 (see Volume 2, which contains Appendix K, with the comment letters and meeting summaries).

As a result of these meetings, BPA was able to obtain valuable input from the tribes concerning potential regional fish and wildlife mitigation and recovery efforts. For example, this EIS includes a policy alternative (the "Weak Stock" alternative) that is based in part on the treaty tribes' recovery plan, Spirit of the Salmon (Wy-Kan-Ush-Mi Wa-Kish-Wit).⁴ Chapter 2 of the EIS includes discussion of historic impacts on tribal cultures from Euro-American settlement and resource use, as well as a discussion of current demographics of the Basin's Native American population. Chapter 5 includes specific actions and mitigation developed from plans written by the treaty tribes. The impact analysis for each policy alternative includes discussion of impacts on tribal resources and other resources upon which the Region's tribes depend. Thus, throughout

² USDOE/BPA 1996b.

³ Federal Caucus 1999b. [Formerly known as Draft "All-H" Paper.]

⁴ CRITFC 1996.

this EIS process, BPA has complied with the Environmental Justice order by engaging the tribes and examining the potential impacts on their communities and resources.

7.6 STATE, AREA-WIDE, LOCAL PLAN AND PROGRAM CONSISTENCY

The CEQ regulations for implementing NEPA (40 CFR §1506.2) require agencies to consider the consistency of a proposed action with approved state and local plans and laws. In accordance with Executive Order 12372, this EIS will be circulated to the appropriate state clearinghouses to satisfy review and consultation requirements.

7.7 COASTAL ZONE MANAGEMENT CONSISTENCY

The Coastal Zone Management Act of 1972 requires Federal actions to be consistent, to the maximum extent practicable, with approved state Coastal Zone Management programs. The Policy Direction alternatives examined here are not expected to have coastal zone impacts. If an action that could affect the coastal zone were undertaken in a subsequent site-specific document that is tiered to this EIS, BPA would consult with the appropriate state(s) to ensure consistency with the state programs.

7.8 FLOODPLAINS MANAGEMENT

Executive Order 11988 (Floodplain Management) and DOE regulations implementing the Executive Order (10 CFR Part 1022) direct BPA to avoid, to the extent possible, the long- and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative. Avoiding impacts on floodplains by siting structures outside such areas will be addressed, as appropriate, during follow-on site-specific environmental studies that may be associated with the implementation of any of the Policy Direction alternatives addressed in this EIS.

7.9 WETLANDS PROTECTION

Executive Order 11990 (Protection of Wetlands) and DOE regulations implementing the Executive Order (10 CFR Part 1022) direct BPA to minimize the destruction, loss, or degradation of wetlands; and to preserve and enhance the natural and beneficial values of wetlands. Any site-specific actions tiered to this EIS will be evaluated to determine whether they include actions in or affecting a wetland or result in a net loss of wetlands. If a wetland would be affected, a finding must be made that there is no practicable alternative to affecting that wetland and that all practicable measures have been taken to minimize harm.

7.10 FARMLAND PROTECTION

The Farmland Protection Policy Act (7 U.S.C. 4201 et seq.) requires Federal agencies to identify and take into account the adverse effects of their programs on the preservation of farmlands. Any subsequent actions considered in an environmental document tiered to this EIS would be evaluated to determine whether those actions would convert farmland to other uses or cause physical deterioration and/or reduction in productivity of farmlands. A farmlands assessment would be prepared if any prime or unique farmland or farmland of statewide importance were affected.

7.11 RECREATION RESOURCES

The Wild and Scenic Rivers Act designates qualifying free-flowing river segments as wild, scenic, or recreational. The Act establishes requirements applicable to water resource projects affecting wild, scenic, and recreational rivers within the National Wild and Scenic Rivers System, as well as rivers designated on the National Rivers Inventory. Under the Act, a Federal agency may not assist in the construction of a water resources project that would have a direct and adverse effect on the free-flowing, scenic, and natural values of a wild or scenic river. The terms of this act apply to several tributaries and reaches in the Basin's rivers. Any site-specific actions tiered to this EIS will be evaluated to determine whether they affect a component of the National Wild and Scenic Rivers System.

On November 17, 1986, Congress established the Columbia River Gorge National Scenic Area as a Federally recognized and protected area. The Act also created a Columbia River Gorge Commission, which adopted a management plan on October 15, 1991. Any site-specific actions tiered to this EIS will be evaluated to determine whether they affect the visual, recreational, or other conditions within then Scenic Area, and whether such actions would be compatible with the Management Plan.

The Wilderness Act of 1964 establishes the National Wilderness Preservation System. Areas designated as wilderness under the original Act and subsequent wilderness legislation are to be administered for the use and enjoyment of the public in such a manner as to leave them unimpaired as wilderness. Any site-specific actions tiered to this EIS will be evaluated to determine if they affect any wilderness areas within the Region.

The Land and Water Conservation Fund Act assists in preserving, developing, and ensuring accessibility of outdoor recreation resources. The Act establishes specific Federal funding for acquisition, development, and preservation of lands, water or other interests authorized under the ESA and National Wildlife Refuge Areas Act. Any site-specific actions tiered to this EIS will be evaluated to determine whether they would impair acquired or developed sites or preclude intended uses.

In 2000, then-President Clinton created the Hanford Reach National Monument. A number of the policy alternatives include actions that could affect the natural resources and recreational values of this monument. Before undertaking such actions, BPA would work with the Department of the Interior agencies managing the Monument to coordinate the actions and minimize adverse impacts.

7.12 GLOBAL WARMING

A discussion of possible global warming effects from the regional operation of thermal resources (mostly combined-cycle combustion turbines, as well as the potential to increase operation of coal) and changes in operation of extra-regional resources has been incorporated by reference from BPA's Business Plan EIS⁵ and presented in this EIS.

7.13 PERMITS FOR STRUCTURES IN NAVIGABLE WATERS

If a proposed action subsequent to this EIS were to include a structure or work in, under, or over a navigable water of the United States; a structure or work affecting a navigable water of the United States; or the deposit of fill material or an excavation that in any manner alters or modifies the course, location, or capacity of any navigable water of the United States, the required Section 10 Permit under the Rivers and Harbors Appropriations Act of 1899 would be sought from the Corps.

7.14 PERMITS FOR DISCHARGES INTO WATERS OF THE UNITED STATES

A Section 404 Permit (Permit for Discharges into the Waters of the United States) under the Federal Water Pollution Control Act (Clean Water Act) of 1972, as amended, would be required from the Corps if a subsequent action were to include the discharge of dredged or fill material into waters of the United States. Such a permit would be sought.

7.15 PERMITS FOR RIGHTS-OF-WAY ON PUBLIC LAND

If a subsequent action were to involve the use of public or Indian lands not in accordance with the primary objective of the management of those lands, under the Federal Land Policy and Management Act (43 U.S.C. 1701 et seq.), a Federal permit for a right-of-way across such lands would be required. Such a permit would be sought.

⁵ USDOE/BPA 1995a.

7.16 ENERGY CONSERVATION AT FEDERAL FACILITIES

None of the alternatives analyzed in this EIS includes the operation, maintenance, or retrofit of an existing Federal building; the construction or lease of a new Federal building; or the procurement of insulation products. Therefore, the requirements for energy conservation at Federal facilities do not need to be addressed.

7.17 POLLUTION CONTROL AT FEDERAL FACILITIES

In addition to their responsibilities under NEPA, Federal agencies are required to carry out the provisions of other Federal environmental laws. For example, to the extent applicable to an alternative presented in this EIS, compliance with the standards contained in the following legislation is mandatory:

- Title 42 U.S.C. 7401 et seq., The Clean Air Act, as amended.
- Title 33 U.S.C. 1251 et seq., The Clean Water Act, as amended.
- Title 42, U.S.C. 300 F et seq., The Safe Drinking Water Act, as amended.
- Title 42 U.S.C. 9601 [9615] et seq., The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
- Title 7 U.S.C. 136 et seq., The Federal Insecticide, Fungicide, and Rodenticide Act, as amended.
- Title 42 U.S.C. 6901 et seq., The Resource Conservation and Recovery Act of 1976, as amended.
- Title 15 U.S.C. et seq., The Toxic Substances Control Act, as amended; Title 40 CFR Part 761, "Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions."
- Title 42, U.S.C. 4901 et seq., The Noise Control Act of 1972, as amended.

Specifically, with regard to certain of these statutes:

The Clean Air Act establishes a comprehensive program for improving and maintaining air quality throughout the United States. The goals of the Clean Air Act are achieved through permitting of stationary sources, restricting the emission of toxic and other pollutants from stationary and mobile sources, and establishing Ambient Air Quality Standards (AAQSs). The EPA has generally delegated responsibility for attaining and maintaining the national standards to the states, through approval of state implementation plans. Increased fugitive dust emissions and additional air emissions from new or modified thermal power plants would be the major sources of air impacts from actions emanating from the selected Policy Direction. Such actions would be tiered to this EIS and would undergo any necessary permitting requirements when they are better defined.

The Clean Water Act sets national goals and policies to eliminate discharge of water pollutants into navigable waters, to regulate discharge of toxic pollutants, and to prohibit discharge of pollutants from point sources without permits. The Clean Water Act also authorizes EPA to establish water-quality criteria that are used by states to set specific water quality standards. The primary water-quality issues pertaining to the operation of the hydrosystem are increased turbidity, gas-saturation levels, and water temperatures. Historically, efforts to reduce temperatures and gas levels have often conflicted with the recommendations from NMFS for salmon recovery. The operating agencies will continue to address this issue as they balance fish and wildlife recovery measures with operation of the hydrosystem.

7.18 INDIAN TREATIES

The existing Indian tribal and reservation structure in the Columbia River Basin is largely the result of treaties between the United States government and the tribes during the period of Euro-American settlement of the West. A treaty is a contract between sovereign nations. The preservation of treaty rights is a responsibility of the entire Federal government.

7.19 OTHER

The Estuary Protection Act establishes a program to protect, conserve, and restore estuaries. It includes provisions for Federal management of estuarine areas in coordination with states and requires that all Federal projects consider impacts on estuarine areas. The purpose of the Watershed Protection and Flood Protection Act is to protect watersheds from erosion, floodwater, and sediment damages. Both of these statutes must be considered with respect to site-specific actions that may be tiered to a selected policy alternative.

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